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# The Procreative Argument for Proscribing Same-Sex Marriage<sup>1</sup>

by DOUGLAS W. KMIEC\*

## Why Traditional Marriage Matters To A Free Society

Traditional marriage between a man and a woman matters. In its ideal form, traditional or heterosexual marriage transforms by covenant, the emotional and sexual attraction of two individuals into a lasting relationship capable of sharing intimate personal goods as well as serving larger social purposes. The first civilization of the family necessarily rests upon the marital faithfulness of the couple and the creation of a complementary unity that is distinct from either individual. When the marital union is strong it is also stable, and in this atmosphere of stability children are welcomed and reared to be responsible, healthy and well-educated citizens.

Sustaining both the love that gives rise to the formation of a traditional family as well as the particularized education and care of the children born of the marital union of a man and woman, traditional marriage stands at the boundary of private and public life. Within the private sphere of married life, there is little imposition of duty by public authority. Sentiment and kinship, rather than constitution or law, govern. At home, the marital union or the family live by its own ideas of liberty, equality and due process and these – absent evidence of abuse – are generally free from governmental intrusion or second-guessing.

*Lawrence v. Texas*<sup>2</sup> somewhat controversially extends this

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freedom beyond the traditional family to protect a given form of sexual expression. This is controversial since *Lawrence* thereby severs the mutuality of freedom and obligation that had always existed between family and public sovereign in lieu of a more unilateral privacy claim dependent thinly upon a demand of individual autonomy and a prudential recognition of the limits of the law.

In the past, the *intra-marital union* or *intra-family*, freedom of a traditional family was acknowledged in exchange for the faithful performance by the family of social expectations or obligations toward the education and care of family members. The public sovereign respected the private marital union so long as it yielded new individuals with sufficient qualities to maintain the on-going functions of the community as a whole. In short, the public sovereign anticipated that those raised *intra-family* had received such direction that, upon emancipation and emergence into the public community as free and independent citizens, they would live productive lives and respect the equal dignity of human beings notwithstanding the far greater anonymity of the larger society. By comparison, the Court makes the public sovereign (that is, "we the people") stay its hand in *Lawrence* with respect to a non-traditional sexual practice without any articulated social expectations for that relationship and simply because it would be practically impossible or unseemly to do otherwise.

### **Marriage And Procreation Are Necessarily Linked**

Despite the differences between the marital freedom of a traditional family and mere autonomy claims glossed over in *Lawrence*, it can be reasonably speculated that same-sex individuals desire intimacy or a private sphere of decision making as much as heterosexual couples within a traditional marriage. Indeed, the Massachusetts Supreme Judicial Court made this desire the linchpin for its conclusion that Massachusetts' constitution precludes limiting marriage to a man and a woman.<sup>3</sup> Proclaiming to break the linkage between marriage and procreation, the *Goodridge* court called this yearning for intimacy the "sine qua non" of the marital relationship. Of course, apart from sexual intimacy there is evidence of a modest

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2. 539 U.S. 558 (2003).

3. *Goodridge v. Dept. of Public Health*, 440 Mass. 309 (2003).

level of interest by same-sex couples in child-rearing,<sup>4</sup> though as discussed below, there are serious and sensitive disputes about the comparative level of that interest and its efficacy.<sup>5</sup> Such doubts about the differences between same-sex and traditional child-rearing require further study, and any discussion of the existing or future empirical literature must always be conducted equally free of gender stereotype or homophobic animus or polemical allegations of the same.<sup>6</sup>

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4. William L. Pierce, *Adopting Numbers*, NAT'L REV. ONLINE, at <http://www.nationalreview.com/comment/comment-pierce082703.asp>. (Aug. 27, 2003).

5. Paul Cameron & Kirk Cameron, *Did the APA Misrepresent the Scientific Literature to Courts in Support of Homosexual Custody?*, 131 J. OF PSYCHOL. 313 (1997). See also, Timothy J. Dailey, *Homosexual Parenting: Placing Children at Risk*, at <http://www.orthodoxytoday.org/articles/DaileyGayAdopt.htm>

6. It should be observed that the recognition of gender equality in the marketplace, however, would not seem to alter the essence of the procreative case for traditional marriage. Whether women divide their time between home and market or give greater emphasis to one over the other, only men and women together can yield new life by sexually reproductive means. This is important to state clearly since there is no basis in the modern constitutional doctrines of gender equality to assume that the legal prohibition of gender stereotype has somehow led to the physical or scientific identity of the genders. Abundant research, much of it well catalogued and analyzed by Steven E. Rhoads in *Taking Sex Differences Seriously*, demonstrates that gender differences persist regardless of market or non-market pursuits. STEVEN E. RHOADS, *TAKING SEX DIFFERENCES SERIOUSLY* (2004). Rhoads observes, for example, that "women and mothers are more attached to young children than men and fathers are," and this is reciprocated by the children. At the same time, Rhoads' work and the research of many on fatherless families "almost universally shows [the father's absence] to be deleterious in a host of important areas":

Though father-absence hurts both girls and boys, the latter are particularly at risk. Boys raised in families without a biological father are more likely to exhibit delinquent and criminal behavior. Boys raised in single-parent families are twice as likely to have committed a crime, and boys raised in stepfamilies are three times as likely to have done so.

*Id.* at 83.

Does the literature on single-parent households and fatherless households carry over to the same-sex context? There are claims both ways. Sociologist David Popenoe has written that "I know of few other bodies of data in which the weight of evidence is so decisively on one side of the issue: On the whole, for children, two-parent families are preferable." David Popenoe, *The Controversial Truth: Two Parent Families Are Better*, N.Y. TIMES, Dec. 26, 1992, at A21. Yet, as gay marriage advocate Evan Wolfson has pointed out, this finding may well reflect simply the greater resources, on average, of families with two parents, rather than one. EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY AND GAY PEOPLE'S RIGHTS TO MARRY* (2004). Wolfson is on shakier ground when he claims that there is no proof that gay parents turn out gay children. *Id.* Wolfson himself concedes that "science still hasn't fully determined how our sexual orientation . . . is formed . . ." *Id.* at 98. Responsible voices have raised cautionary concerns. Recently, a federal appellate court, for example, sustained Florida's prohibition of same-sex adoption, noting the rational state interest in "emphasizing [the]

That said, neither the common desire for intimacy nor even an assumed comparability of child-rearing capability between same-sex and traditional couples addresses the heart of the state interest for maintaining marriage as an institution between a man and a woman. In brief, that interest is *both the encouragement of procreation and its responsible treatment by heterosexual couples*. Before elaborating on the nature and constitutional acceptability of this interest, a number of red-herrings need to be set aside almost immediately.

First, the acceptance of the procreative state interest does not depend upon excluding from marriage those who cannot physically procreate because of age or infertility. This is unfortunately a frequent and unpersuasive argument made by homosexual marriage advocates when the importance of maintaining the relationship between procreation and marriage is stated.<sup>7</sup> Understanding and admitting the promotion and responsible exercise of procreation to be a vital or compelling state interest, logically separates same-sex couples from other nonprocreative classes. The elderly or infertile cannot be separated without a constitutionally impermissible, individualized inquiry. It would be highly intrusive of privacy for the state to inquire of heterosexual couples to determine if they are disinclined toward procreation or infertile, and settled constitutional jurisprudence provides that government may not intrude “into matters so fundamentally affecting a person as the decision whether

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vital role that dual-gender parenting plays in shaping sexual and gender identity.” *Lofton v. Sec’y of the Dept. of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004). In this regard, the state prefers those within a traditional marriage, or even an unmarried heterosexual, in the adoption context recognizing that “[i]n our society, we expect that parents will provide [sex] education to teenagers in the home. These subjects are often very embarrassing for teenagers and some aspects of the education are accomplished by the parents telling stories about their own adolescence and explaining their own experiences with the opposite sex.” *Id.* at 822.

Justice Ruth Bader Ginsburg has been a thoughtful advocate for gender equality throughout her career, yet, she has written for the Court that the genders are simply not identical. “Physical differences between men and women, however, are enduring: ‘[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’” *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). “‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” *Id.* In this, Justice Ginsburg fairly rejects the same-sex claim that “the modern individuation of women has resulted in the kind of fluidity of gender roles for men and women” that makes the presence of both genders within a family unnecessary. Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1606 (1997).

7. See WOLFSON, *supra* note 6, at 80 (2004).

to bear or beget a child.”<sup>8</sup>

Frankly, such individualized inquiry is unnecessary for the social good —or as the Supreme Court put it, “the existence and survival of the race.”<sup>9</sup> It is unnecessary, that is, *so long as the vast majority of those who do marry in a society are capable and inclined toward having children and then to rearing them responsibly*. While the state can tolerate a modest level of disinterest or inability to procreate, it is far more questionable whether any state can rationally be indifferent to sustaining its population by giving public marital sanction to individuals who, because of physical reality and the nature of their sexual relationship, cannot procreate.

In response, same sex marriage advocates typically highlight adoptions by some same sex couples or asexual means of reproduction. Neither response is sufficient nor unproblematic. Given the costly and cumbersome nature of adoption and asexual reproduction,<sup>10</sup> it is not surprising to find some debate in the academic literature over exactly how welcoming or inclined homosexual partners are toward including children by these means. For instance, a recent report suggests that gay claims of interest in adoption are overstated. Of the 1.6 million children under 18 in adopted households only 1.8 percent were in gay or lesbian households, or about, 29,000 children in each setting.<sup>11</sup> Even if the possibility of gay and lesbian adoption is conceded, adoption – how ever well-motivated and praiseworthy in terms of providing for a neglected child – does not yield new children, it merely re-allocates existing ones. By comparison to the 58,000 or so adopted children in gay settings, there are close to 60 million biological children under 18

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8. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

9. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

10. The Indiana Court of Appeals in rejecting state constitutional claims to same-sex marriage in *Morrison v. Sadler*, 821 N.E.2d 15, 24 n.10 (Ind. Ct. App. 2005) noted that:

The average cost of one IVF cycle in the United States, and it frequently takes multiple cycles in order to succeed, has been estimated at \$12,400, which usually is not covered by health insurance. See American Society of Reproductive Medicine, “Frequently Asked Questions About Infertility,” <http://www.asrm.org/Patients/faqs.html> (last visited January 11, 2005). Current estimates of adoption costs range from zero, in some instances, to as much as \$40,000 or more. See U.S. Department of Health and Human Services, Administration for Children and Families, “Costs of Adopting: A Factsheet for Families,” [http://naic.acf.hhs.gov/pubs/s\\_cost/s\\_costs.pdf](http://naic.acf.hhs.gov/pubs/s_cost/s_costs.pdf) (published June 2004).

11. William L. Pierce, *Adopting Numbers*, NAT’L REV. ONLINE, at <http://www.nationalreview.com/comment/comment-pierce082703.asp>. (Aug. 27, 2003).

according to the 2000 Census.<sup>12</sup>

The potential procreative harm of recognizing same-sex marriage is also magnified because the rate of world population growth has declined by more than 40% since the late 1960s.<sup>13</sup> “[T]he average woman in the world bears half as many children as did her counterpart in 1972. No industrialized country [the United States included] still produces enough children to sustain its population over time. . . .”<sup>14</sup> The primary present cause of under-population is said to be the cost-benefit conclusion that “children offer little or no economic reward to their parents, and as women acquire economic opportunities and reproductive control, the social and financial costs of childbearing continue to rise.”<sup>15</sup> Redefining marriage in the *Goodridge* manner to mean merely “a relationship of emotional and financial interdependence between two people who make a public commitment”<sup>16</sup> thus aggravates a pre-existing, and in light of the modern experience of packed freeways, little recognized problem. Today, traditional parents make an investment of over \$200,000 (exclusive of college) to bring up a child to age 18, and yet, they often receive the same economic benefits as those who do not invest in raising children. Adding an increased number of childless homosexual partners to the mix makes matters worse.

Under-population has multiple effects beyond inequities in social welfare systems, however. When fertility drops below national replacement levels, the number of productive workers likewise falls. So too, countries with a low ratio of workers to retirees experience less entrepreneurship and innovation. Elderly and pension benefits gradually consume an ever larger share of GDP, currently over 9%, but estimated to be rising to 20% by 2040. And in these terror-ridden times, it is not only the economy that nosedives with fewer workers, but national defense. The collapse of the birth rate in the former Soviet Union resulted in 5.2 million fewer Russians between the ages of 15 and 24 in comparison to 25 years earlier. And while high

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12. U.S. Census Bureau, CENSUS 2000 PHC-T-21, ADOPTED CHILDREN AND STEPCHILDREN: 2000, TABLE 1: SELECTED CHARACTERISTICS OF CHILDREN OF THE HOUSEHOLDER BY TYPE OF RELATIONSHIP AND SEX OF CHILD FOR THE UNITED STATES: 2000, at <http://www.census.gov/population/cen2000/phc-t21/tab01.pdf> (Aug. 22, 2003).

13. Phillip Longman, *The Global Baby Bust*, 83 FOREIGN AFFAIRS, May 1, 2004, at 64.

14. *Id.*

15. *Id.*

16. WOLFSON, *supra* note 6, at 191.

technology may replace some of the foot-soldiers, the money for such is being diverted to pension benefits. "The Pentagon today spends 84 cents on pensions for every dollar it spends on basic pay."<sup>17</sup> Phillip Longman in *Foreign Affairs* sums this evidence nicely:

Does this mean that the future belongs to those who believe they are (or who are in fact) commanded by a higher power to procreate? Based on current trends, the answer appears to be yes. Once, demographers believed that some law of human nature would prevent fertility rates from remaining below replacement level within any healthy population for more than brief periods. After all, don't we all carry the genes of our Neolithic ancestors, who one way or another managed to produce enough babies to sustain the race? Today, however, it has become clear that no law of nature ensures that human beings, living in free, developed societies, will create enough children to reproduce themselves.<sup>18</sup>

Asexual reproduction will not fill the gap of under-population. At a minimum, the literature on the risks associated with non-biological parenting raises concerns about giving greater public sanction to households where biological parenting would not be the norm.<sup>19</sup> Even if it is theoretically possible for a lesbian couple to share a jerry-rigged biological relationship with a child – where, for example, one lesbian partner supplies the egg and the other acts as a womb surrogate – no same-sex couple can mutually share a genetic

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17. Longman, *supra* note 13.

18. *Id.* The United Nations has confirmed similar statistics with regard to the below-replacement levels of developed countries, writing "because fertility levels for most of the developed countries are expected to remain below replacement level during 2000-2050, the populations of 33 countries are projected to be smaller by mid-century than today (e.g., 14 per cent smaller in Japan; 22 per cent smaller in Italy, and between 30 and 50 per cent smaller in the cases of Bulgaria, Estonia, Georgia, Latvia, the Russian Federation and Ukraine)." Press release of February 26, 2003, BELOW-REPLACEMENT FERTILITY EXPECTED IN 75 PER CENT OF DEVELOPING COUNTRIES BY YEAR 2050 ACCORDING TO UN POPULATION REPORT, at <http://www.un.org/News/Press/docs/2003/pop850.doc.htm>.

19. Rhoads writes: "[A]lthough stepfathers can raise family income considerably, they do not help prevent childhood and adolescent problems. Large numbers of stepfathers become disengaged from parenting and compete with the child for the mother's time. Stepfathers praise and hug their children significantly less than biological fathers do. They are less likely to have intense conversations with them. Even worse, child abuse goes way up when stepfathers are present. Stepfathers commit most of this abuse, but even biological mothers are more abusive when they remarry than when they remain single. The rate of infanticide increases by 6,000 percent, and sexual abuse increases by a multiple of eight in stepfamilies as compared with traditional families." RHOADS, *supra* note 6, at 83 (citing studies).



relationship with the same child. Lesbian advocates tell us they hope for the day when speculations about “egg fusion” may allow “two women [to] produce a daughter with two mothers and no father.”<sup>20</sup> But whatever reproductive techniques may emerge in the future, the reality of the present is that asexual methods of reproduction are costly, intrusive, unevenly successful, and fraught with their own ethical dilemmas and medical risks. One study observes that “less than 0.5% of infertile couples in the U.S. are helped by in-vitro fertilization each year.”<sup>21</sup> It is not surprising, therefore, that such means account for only a tiny fraction of births in the United States.

In truth, the advocates of same sex marriage cannot genuinely mean that procreation has not been, in fact, linked with marriage. Rather, what same-sex partisans actually mean is that they would prefer procreation not to be associated with the marital estate. Self-described lesbian author Maura I. Strassberg writes, for example: “Marriage is essential to procreation only where extra-marital sex is criminalized and procreation is dependent upon sex.”<sup>22</sup> What an extraordinary claim. It pretends to make that which is obviously good – marital fidelity and natural childbirth – seem odd or dispensable. Unlike this curious claim of Professor Strassberg, the average person associates marriage with procreation. Sexual reproduction for the human species is not merely one of several equally attractive ways to bring forth a child, it is *the* assumed way. It is no coincidence that those with religious beliefs that correspond most strongly with a traditional understanding of marriage as linked to procreation do, indeed, have the most children. Utah, with its large percentage of Mormons, produces 90 children for every 1000 women of childbearing age. “By comparison, Vermont . . . the [first] state to embrace gay

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20. Strassberg, *supra* note 6, at 1602 n.566.

21. Tim Drake, *Couples Ask: What's Wrong With In-vitro Fertilization?*, NAT'L CATHOLIC REGISTER, Aug.14, 2004, available at [http://catholiceducation.org/article/medical\\_ethics/me0064.html](http://catholiceducation.org/article/medical_ethics/me0064.html). The author notes that “the cost of such techniques remains high and the success rates low.” *Id.* One reason for the poor success rates is that many clinics fail to diagnose the source of the infertility, preferring instead to immediately pursue asexual means. There are longstanding and well-articulated religious and moral objections to giving preference to the laboratory over natural procreation, not the least of which involves the implications it has for the uniqueness and equality of human life. Moreover, Drake quotes Father Tadeusz Pacholczyk, the director of education of the National Catholic Bioethics Center in Philadelphia, who states that there are studies that “have shown a sixfold elevated risk for in-vitro fertilization children contracting an eye disease called retinal blastoma versus normally conceived babies.”

22. Strassberg, *supra* note 6, at 1557.

civil unions [] produces only 49.”<sup>23</sup>

Observing that adoption or asexual reproduction cannot substitute for natural procreation may be met with the objection that allowing same-sex marital unions need not have an adverse effect on the number of heterosexual couples who wish to marry and procreate. Gay and lesbian advocacy thus denies any adverse effect of recognizing same-sex marriage on the number of traditional or heterosexual marriages.<sup>24</sup> Perhaps, this cannot be so easily dismissed, however, since it is not unreasonable to assume that the frequency of a relationship newly given public approval will be greater. Along these lines, Robert Bork has written: “[b]y equating heterosexuality and homosexuality, by removing the last vestiges of moral stigma from same-sex couplings, such marriages will lead to an increase in the number of homosexuals.”<sup>25</sup> Whether explained by public affirmation or not, something is going on. According to the Census Bureau, the number of same-sex couples in the United States increased dramatically during the last decade, from just 150,000 in 1990 to nearly 600,000 in 2000.<sup>26</sup>

In addition, giving public sanction to a homosexual relationship which is premised upon mere intimacy without regard to natural procreation or associated social expectations is likely to bolster the public acceptance of heterosexual cohabiting relations outside of marriage which independently have exploded in number. This has been exactly the experience in the Netherlands where the legal sanctioning of same-sex unions has diluted the significance of marriage and posed all the social and economic perils (for children) and instability (for both partners and children) associated with casual cohabitation.<sup>27</sup>

23. Longman, *supra* note 13.

24. Strassberg, *supra* note 6, at 1614-16.

25. Robert H. Bork, *The Necessary Amendment*, First Things: A Monthly Journal of Religion and Public Life 17 (August/September 2004).

26. U.S. Census Bureau, *supra* note 12.

27. Stanford's Stanley Kurtz writing for *National Review Online* finds:

As we've seen, the upswing in the Dutch out-of-wedlock birthrate coincides with the enactment of registered partnerships and gay marriage. A diligent search for alternative explanations, such as access to contraception and women in the workforce, yields nothing that correlates well with the rise of out-of-wedlock birthrates in the Netherlands. Both opponents and supporters of gay marriage linked the willingness to embrace same-sex marriage with increasing social and legal acceptance of cohabitation rather than marriage for couples with children. Although pinpointing cause and effect raises particular challenges when studying the intricacies of human social life, there are now at least strong indications that

The last point underscores that same-sex and heterosexual couples are differently situated in by virtue of the inherent inability of same-sex couples to naturally procreate. Even as the inability of same sex couples to procreate is patent, the threats to social program posed by the contemporary reality of under-population are more subtle and are not well observed. Consider, as just one handy example, the difficulty of problem recognition that the President of the United States has encountered as he has attempted to highlight the under-population-abetted potential bankruptcy of the social security system. To address these and other health and welfare collateral effects of under-population alone, the state would have a reasoned basis to decline to affirm, recognize, or license a sexual practice that separates all sexual fulfillment from procreative possibility.

The alert reader will also discern a derivative state procreative justification for limiting marriage licensing, not just on the basis of procreative possibility (the universe of all heterosexual couples), but a more limited subset of responsibly procreative heterosexual couples. In other words, a state interest in discouraging the public affirmation of sexual practices that occur in total disregard of the possibility of procreation is a state interest that is strong enough to discourage irresponsible heterosexual practice. Public licensing or affirmation is thus limited so that it may be deployed as an instrument to convey the seriousness of engaging in sexual practice that may beget children – a point especially important to convey to a potential father whose practical and physical connection to a child does not approximate that of a potential mother. Here, too, homosexual and heterosexual classes are not similarly situated. Same-sex individuals wanting to incorporate children into a household, to compensate for physical inability, must invest sizeable personal efforts and sums to adopt or to engage in asexual fertilization attempts. There is no corresponding difficulty among heterosexual individuals who are fertile. A state has an important interest in reserving the marriage license as a means of instilling an ethic of responsible procreation among heterosexual couples. This is exactly the rationale employed by the Indiana Court of Appeals in *Morrison v. Sadler* to sustain its Defense of Marriage Act as well as that state's refusal to issue same-sex marriage licenses. Wrote the court:

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Dutch gay marriage has contributed significantly to the decline of Dutch marriage. Stanley Kurtz, *No Explanation at*  
<http://www.nationalreview.com/kurtz/kurtz200406030910.asp>. (June 3, 2004)

The State...identified the protection of *unintended* children resulting from heterosexual intercourse as one of the key interests in opposite-sex marriage. The institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly. The recognition of same-sex marriage would not further this interest in heterosexual "responsible procreation." Therefore, the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by "natural" means.<sup>28</sup>

This very same point was made by the dissent in *Goodridge*, but there it went unanswered as a slim majority with hurried and unexamined assertion chose to sever the linkage between marriage and procreation. Justice Cordy of the Supreme Judicial Court of Massachusetts in dissent observed the procreative ill-effects of the *Goodridge* path:

Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined[,] . . . but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism. . . . The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by

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28. *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. 2005).

formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.<sup>29</sup>

### Marriage Is More Than Sexual Relations

Occasionally hiding behind the benign public face of the same-sex equality claim is a far more libertine, indeed anti-social, approval of extra-marital sex. In some respects, those who today advocate homosexual practice and same-sex marriage are the direct descendants of the fourth century Manicheans. The Manichees subscribed to the notion that human beings were sparks of light or energy that were imprisoned by the created world order. Good in a Manichean society took the form of defying created human nature, including procreative intercourse.<sup>30</sup> The Manichees in essence taught that it was salutary to hate one's body. The Manichees not surprisingly did not have a large impact upon the social order of their time, or any other, but their self-centeredness was certainly part of the Roman order, which indulged numerous sexual practices, including prostitution, homosexual relations, and masturbation.<sup>31</sup>

In the fourth century, St. Augustine challenged both the Manichean and Roman perspectives identifying the three essential elements of marriage to be "procreation, fidelity, and lifelong unity,"<sup>32</sup> even as Augustine charitably conceded that the infertile and aged do capture part of the marital good by "a natural companionship between the sexes."<sup>33</sup> Those who *deliberately* frustrate the procreative purpose of marriage, however, were seen as fornicators – a point plainly made by the twelfth century canon lawyer, Gratian.<sup>34</sup> All this came to be summarized by philosopher and theologian, Thomas Aquinas, who specified marriage's primary purpose as "the

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29. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting) (citations omitted).

30. JOHN T. NOONAN, *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS* 107-112 (enl. ed., 1986).

31. JAMES A. BRUNDAGE, *LAW, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 27 (1987).

32. Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 *BYU J. PUB. L.* 449, 452 (2004).

33. ST. AUGUSTINE, *DE BONO CONIUGALI*, § 3.3 at 6 (P.G. Walsh ed., Oxford University Press 2001) (401).

34. Gratian's thinking is nicely addressed by Charles Reid, *supra* note 32.

procreation of children, but also their upbringing and their training in the perfect state of man, which is the state of virtue.”<sup>35</sup>

This natural law understanding of marriage was well accepted and understood contemporaneous with the drafting of the American Constitution. A leading figure of the New York bar, Chancellor James Kent described marriage as a natural law concept pre-dating all government, including that of America. No less a liberal than William O. Douglas would say exactly the same a century and a half later in *Griswold v. Connecticut*.<sup>36</sup> In his famous *Commentaries*, Kent writes:

[T]he primary and most important of the domestic relations, is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age, it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of marriage, a great share of the blessings which flow from the refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts.<sup>37</sup>

This natural law understanding of marriage as far more than sexual relations worked its way into the law of the United States often without statute. As Kent asked rhetorically, “[a]re the principles of natural law . . . to be left unheeded, and inoperative, because we have no ecclesiastical Courts recognized by law, as specially charged with the cognizance of such matters?”<sup>38</sup> The answer for Kent, the founding generation, and each succeeding one to the present, has been “of course not.” The “[p]rohibitions of the natural law are absolute, uniform, and universal obligation. They become rules of the common law, which is founded in the common reason and acknowledged duty of mankind, sanctioned by immemorial usage, and, as such, are

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35. THOMAS AQUINAS, SUMMA THEOLOGIAE, Supplementum, Question 41, article 1, resp.

36. 381 U.S. 479, 486 (1965). “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” *Id.*

37. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 74 (3d ed. 1838).

38. *Wightman v. Wightman*, 4 Johns. Ch. 343, 347 (1820).

clearly binding.”<sup>39</sup> By the middle of the nineteenth century well into the present day, it was common to find judicial recognition that marriage is not mere sexual relations – “not the comfort and convenience of the immediate parties. . . . [T]he paramount purpose of the marriage [is] the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind; from which proceed all the civilization, virtue, and happiness to be found in the world.”<sup>40</sup>

By stark contrast, same-sex marriage proponent Professor Maura Strassberg argues not only for the severance of marriage and procreation, but also for the separation of marriage and sexual relationship. Since states have de-criminalized extra-marital relations, Strassberg argues, “any necessary link between marriage and sex” can also now be severed. Again, the notion of legitimizing non-reproductive, extra-marital sexual relations is a rather startling proposition that would not seem well calculated to advance the cause of same-sex marriage in the court of public opinion.

Studies reveal that homosexual and heterosexual men have a similar desire for uncommitted sex.<sup>41</sup> Most women, by contrast, have the opposite preference, and for this reason, heterosexual men over their lifetimes have fewer partners, with marriage ideally focusing a man upon one. By contrast, “[a]mong male homosexual couples, 43 percent have had sex with more than twenty partners,”<sup>42</sup> and there is nothing to suggest that this attitude will change simply by the expedient of re-labeling the relationship.<sup>43</sup>

The consequences of “mutual expressions of sensuality”<sup>44</sup> without procreative unity and commitment are well known apart from the same-sex marriage claim. The lessons of widespread children out of wedlock and resulting increases in crime and decreases in health and education cannot be seen as irrelevant here.<sup>45</sup>

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39. KENT, *supra* note 37, at 347.

40. Matchin v. Matchin, 6 Pa. 332, 337 (1847).

41. RHOADS, *supra* note 6, at 51.

42. *Id.*

43. Here, evolutionary studies do find distinction between homosexual men and women, with lesbians having a desire for fewer sexual partners. *Id.* While this improves a lesbian couples standing vis-a-vis adoption in terms of stability alone, it does nothing to address the state's interest in procreation within a stable family environment, itself.

44. Strassberg, *supra* note 6, at 1610.

45. See generally, Douglas W. Kmiec, *Marriage and Family*, in NEVER A MATTER OF INDIFFERENCE: SUSTAINING VIRTUE IN A FREE REPUBLIC 113 (Peter Berkowitz ed., 2003).

While same-sex advocates may argue that without procreative capacity, gay marriage will at least not worsen the social problem of illegitimacy, this argument is certainly in tension with their claim that homosexual and heterosexual marital unions should be seen as constitutionally equal in their disposition toward children. In any event, the stability of a relationship built largely upon mutual sensual pleasure cannot realistically be seen as having great stability, and the wrenching consequences of single-parenting after dissolution will be as bad, if not worse, since a homosexual partner with no biological or genetic relationship with a child is more likely than not to be disinterested in providing for, or overseeing, a child's well-being.

### **The Natural Law Understanding Of Marriage As Linked With Procreation Figures Prominently In The Supreme Court's Treatment Of Marriage As A Fundamental Right**

For well over a century, the Supreme Court has held that marriage "is the foundation of the family and of society, without which there would be neither civilization nor progress."<sup>46</sup> In *Skinner v. Oklahoma*, the U.S. Supreme Court invalidated a criminal penalty permitting the sterilization of habitual criminals.<sup>47</sup> In reaching that holding after considering both equal protection and due process arguments, the Justices opined that "[m]arriage and procreation are fundamental to the very existence and survival of the race."<sup>48</sup> This proposition has been repeated by the Court as it found the government to lack a compelling governmental interest to sustain state regulation that conditioned marriage on being up-to-date on child support payments from a previous marriage in *Zablocki v. Redhail*.<sup>49</sup> The procreative basis of marriage has likewise been consistently referenced by lower federal and state courts. For example, a federal court has stated that the "legal protection and special status afforded to marriage... has historically... been rationalized as being for the purpose of encouraging the propagation of the race."<sup>50</sup> The District of Columbia, Minnesota, and Washington have all recognized that marriage uniquely involves the possibility of

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46. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

47. 316 U.S. 535, 543 (1942).

48. *Id.* at 541.

49. 434 U.S. 374, 390-91 (1978).

50. *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982).



the natural procreation of children.<sup>51</sup>

Notwithstanding the above, it is widely speculated that the U.S. Supreme Court may soon be inclined to accept arguments in favor of same-sex marriage. Judge Robert Bork writes that “[w]ithin the next two or three years, the Supreme Court will almost certainly climax a series of state court rulings by creating a national constitutional right to homosexual marriage.”<sup>52</sup> To get to that destination, the Court will have to disavow the link between procreation and marriage as the Massachusetts Supreme Judicial Court did in the invention of a right to same-sex marriage under its state charter. Again the Massachusetts Court in *Goodridge v. Department of Public Health* simply asserted that “the begetting of children . . . is [not] the *sine qua non* of civil marriage.”<sup>53</sup>

As a formal matter, Judge Bork’s prediction seems outweighed by the natural law origin of marriage, *stare decisis*, and even the U.S. Supreme Court’s one-time summary dismissal of an appeal of the Minnesota decision in *Baker v. Nelson*<sup>54</sup> that sustained limiting marriage to a man and a woman against an entire battery of constitutional claims more than thirty years ago. In truth, little more than a single case, *Turner v. Safley*,<sup>55</sup> invalidating Missouri regulations precluding marriage by prison inmates accounts for the legal groundwork for a definition of marriage that does not include procreation.

Prison inmates do not lose all constitutional protections while incarcerated, and the Court has balanced access to marriage against the reasonable needs of prison administration. In doing so, *Turner* matter of factly describes marriage in terms of emotional support and public commitment, religious significance, the receipt of various governmental benefits like social security and property distribution rights, but only the possibility (depending logically upon the sentence) of later consummation (and procreation). *Turner* is thus claimed to sever marriage and the possibility of procreation by not including consummation – and the possibility of procreation – in the

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51. *Dean v. District of Columbia*, 653 A.2d 307, 332 (D.C. 1995); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), all recognizing that no same-sex couple offers the possibility of the birth of children by their union.

52. Bork, *supra* note 21.

53. 798 N.E.2d 941, 961 (Mass. 2003).

54. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

55. 482 U.S. 78, 79 (1987).

Supreme Court's marital description.

This over-reads *Turner* in the extreme. First off, the Court had earlier summarily affirmed a ban on marriages for inmates with life sentences.<sup>56</sup> And even if this earlier ban merely was premised upon penological considerations in light of severity of sentence, the same can be said of *Turner* as well but in the opposite direction. As a matter of state-generosity or penological consideration, the Court urged prison officials to see even non-procreative marriage *in a prison setting* as a means of encouraging prisoner reformation. So too, the Court reasoned, prison officials might authorize more generous access to marriage to minimize religious conflict, which has been a frequent source of difficulty in prison administration. It is mistaken to see *Turner's* highly limited discussion of marital meaning in a prison context as endorsing some "evolving social sense that sexual relations of any kind are not essential to marriage."<sup>57</sup>

Fatuous or not, it did not take very long before some judges started to construe *Turner* out of context. In *Dean v. District of Columbia*,<sup>58</sup> the local District of Columbia appellate court turned away a claim for same-sex marriage, pointing the litigants to the legislature, but one judge gratuitously took the occasion in partial dissent to explain how *Turner* opened the door to homosexual marriage. Judge John Ferren wrote:

[I]f the qualities of marriage described in *Turner* are "relevant to the needs and aspirations of gays and lesbians . . . we have the basis for inquiring whether a marriage statute that excludes homosexuals from the right to marry one another meets equal protection requirements. Appellants proffer that, given the nature of homosexuality, *Turner's* attributes of marriage – emotional support, religious or spiritual significance, physical consummation, and government and other benefits – are as relevant and important to same-sex couples as to heterosexual couples. I perceive no basis for doubting that appellants can make such a showing."<sup>59</sup>

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56. *Butler v. Wilson*, 415 U.S. 953 (1974), summarily affirming *Johnson v. Rockefeller*, 365 F. Supp. 377 (S.D.N.Y. 1973). As the Court, itself, explained in *Turner*, "That case involved a prohibition on marriage only for inmates sentenced to life imprisonment; and, importantly, denial of the right was part of the punishment for crime." *Turner*, 482 U.S. at 96.

57. Strassberg, *supra* note 6, at 1559.

58. 653 A.2d 307 (D.C. Ct. Of App. 1995).

59. *Id.* at 336 (Ferren, J., dissenting in part).

The U.S. Supreme Court has not endorsed this reasoning, even in the much criticized<sup>60</sup> *Lawrence v. Texas*, where the Court found a due process liberty right for two individuals of the same sex to engage in consensual sodomy. Nevertheless, Justice Kennedy opines that “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education” are protected by the Constitution, and then went on to casually remark later that a gay person “may seek autonomy for these purposes, just as heterosexual persons do.”<sup>61</sup> It is not clear if Justice Kennedy and the plurality meant this to be an implied endorsement of same-sex marriage, since the Court also pointed out that the facts in *Lawrence* did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>62</sup> Had the Court truly meant to say that there was a homosexual marriage right, something which Justice O'Connor in a separate opinion based on equal protection analysis expressly denies, the Court presumably would have been far more explicit as well as applied a higher standard of review to the evaluation of state authority.

But there is doubt. As Justice Scalia observed in his *Lawrence* dissent, the Court has gone a long way toward “dismantl[ing] the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions.”<sup>63</sup> For a committed federalist observant of original understanding and state sovereignty, Judge Bork, like President Bush, urges a strikingly federal assertion of power. Bork explains the departure from his usual presumptions this way:

The comfortable shibboleths about a heavy presumption against amending the Constitution no longer have much relevance to the brute facts of our political life. So profound is the departure from a republican form of government that the presumption must now be in favor of amending the Constitution whenever the Court runs wild. Homosexual marriage presents just such an occasion, but if our politicians wait until the Supreme Court has done the inevitable, it will probably be too late for an effective response. Catastrophes

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60. See the highly incisive comments of John O. McGinnis and Nelson Lund, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004).

61. *Id.* at 574.

62. *Lawrence*, 539 U.S. at 578.

63. *Id.* at 604 (Scalia, J., dissenting).

ought not be faced in a spirit of resignation.<sup>64</sup>

Judge Bork's prescription in favor of a Federal Marriage Amendment is strong medicine. It is one that he seeks to anchor in common sense and compassion. Given the "physical and psychological disorders . . . far more prevalent among homosexual men," Judge Bork reasons, "[c]ompassion, if nothing else, should urge us to avoid the consequences of making homosexuality seem a normal and acceptable choice for the young."<sup>65</sup> The advocates of same-sex marriage seek to transform the toleration and privacy accepted in *Lawrence* into a public affirmation. Explaining why the terminology and related benefits of "civil union" are not enough to satisfy the gay/lesbian demands, gay marriage advocate Evan Wolfson quotes with approval the following observation: "civil union connotes toleration of homosexuality, with its attendant recognition of an individual's civil rights; but marriage connotes society's full approval of homosexuality, with previous moral judgments reversed."<sup>66</sup>

A redefinition of the public institution of marriage would be very much an overt and public act. It is decidedly unlike the private sexual intimacy of concern in *Bowers v. Hardwick*<sup>67</sup> or *Lawrence*, and as suggested here, threatens the procreative good of the larger community. It is hardly an expression of animus to state objection to a redefinition with a public harm. Rather, maintaining the definition of marriage is respectful of an institution that is not created by the state and indeed is "older than the Bill of Rights – older than our political parties, older than our school system."<sup>68</sup>

### **The False Analogy Between The Civil Rights Movement And The Effort To Redefine Marriage**

The advocates of same-sex marriage often liken themselves to the champions of racial equality. This analogy is nominally plausible since one of the most famous race cases, *Loving v. Virginia*,<sup>69</sup> took place in the marriage setting. *Loving* held that denying marriage to an interracial couple was contrary to the guarantee of equal protection.

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64. Bork, *supra* note 25, at 21.

65. *Id.* at 19-20.

66. WOLFSON, *supra* note 6, at 134 (quoting William Safire).

67. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas* 539 U.S. 558 (2003).

68. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

69. 388 U.S. 1 (1967).

Is the analogy between ending race-based discrimination with respect to marriage and the effort to redefine marriage by same-sex marriage advocates a fair one? As a formal precedential matter, it has already been rejected by the U.S. Supreme Court.<sup>70</sup> Likewise, some prominent African-American leaders also think the analogy inapt. For example, Pastor Steven Craft of New Brunswick states adamantly:

[A]s an African-American, I find it highly offensive to associate homosexuality with civil rights. People have been trying to run on that civil rights banner and to use this whole idea of homosexual marriage to say it's the next wave of the movement. But race and sexuality have nothing to do with each other."<sup>71</sup>

Same-sex proponent Wolfson notes this comment but argues that Reverend Craft and others are merely being used by the right-wing, although even he later admits there is no simple comparison.<sup>72</sup> What makes the comparison difficult is the perplexing nature of sexual orientation. To the extent sexual orientation is not a choice, but a genetically-determined status or identity, law and justice appropriately resists using that criterion for purposes of drawing legal classification. After all, the injustice of differentiating under law on

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70. 191 N.W.2d 185 (Minn. 1971). As the Indiana Court of Appeals recited in *Morrison v. Sadler*, 821 N.E.2d 15, 19-20 (Ind. Ct. App. 2005):

In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), the Minnesota Supreme Court held that a ban on same-sex marriages did not violate the Fourteenth Amendment. In so holding, the court rejected the same-sex couple plaintiffs' principal argument that *Loving v. Virginia*, 388 U.S. 1 (1967), required that they be issued a marriage license. The court stated that *Loving*, which held bans on interracial marriages violated the Fourteenth Amendment, was decided solely on the grounds of the patent racial discrimination of such statutes. *Baker*, 191 N.W.2d at 187. It also stated, "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* The couple appealed to the United States Supreme Court, which dismissed the appeal without opinion "for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972). Under procedural rules in effect at the time, the Plaintiffs do not contest that, unlike a denial of certiorari, such a dismissal represented a decision by the Supreme Court *on the merits* that the constitutional challenge presented was insubstantial, and which decision is binding on lower courts. See *Hicks v. Miranda*, 422 U.S. 332, 344. Thus, the Supreme Court, five years after it decided *Loving*, determined that that case did not support an argument by same-sex couples that precluding them from marrying violated the Fourteenth Amendment" (citations omitted).

71. WOLFSON, *supra* note 6, at 165 (quoting Rev. Craft).

72. *Id.* at 171 (quoting Prof. Henry Gates Jr., an African-American historian).

the basis of race was that skin color told us nothing about the moral and personal qualities of an individual and was not in any way a "choice."

Such categorical statement is not possible with homosexual orientation, which is said by religious leaders to be "disordered."<sup>73</sup> If sexual orientation proves ultimately to be wholly genetic, a matter which is far from settled, the analogy to race is closer. Even gay marriage advocate Wolfson himself admits the possibility of change of orientation.<sup>74</sup> Independently, whether sexual orientation is or is not a matter of choice does not really answer the state's legal interest in preserving the link between marriage and procreation. Affirming a marital union between two individuals of homosexual orientation would ignore the vital state interest in the level and responsibility of procreation. The fact of a homosexual orientation, whatever its moral significance origin, unlike the fact of race, *does* tell us something about the capability and disposition of the person *in the marital context*.

How ever much the Court's decision in *Lawrence* may come to mean, it certainly is a caution against casual reliance upon majority-determined moral perspective as a singular basis for restricting individual claims of liberty. For this reason, it has been the working thesis of this article that a state interest in procreation can support traditional marriage without need to recur or to assess the importantly related moral claims. Moreover, apart from precedential limits on the people's reliance upon moral source for legislative enactment, the exercise of moral judgment should be admitted to be the most difficult aspect of the marriage question. Giving personal advice of any kind should be premised upon an ethic of care or love, not animus, and this should be especially true when the subject is marriage. For this reason, it is important to be on guard against over-extending into the law argumentation that depends upon sexual orientation alone. Differentiating upon sexual orientation alone in

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73. "Although the particular inclination of the homosexual person is not a sin, it is a more or less strong tendency ordered toward an intrinsic moral evil; and thus the inclination itself must be seen as an objective disorder. "Therefore special concern and pastoral attention should be directed toward those who have this condition lest they be led to believe that the living out of this orientation in homosexual activity is a morally acceptable option. It is not" (No. 3), citing the Congregation for the Doctrine of the Faith, under the direction of Joseph Cardinal Ratzinger, now His Holiness Benedict XVI. The full letter can be found at [http://catholicinsight.com/online/church/vatican/article\\_462.shtml](http://catholicinsight.com/online/church/vatican/article_462.shtml).

74. *Id.* at 174.

the general workplace ought not be tolerated, as hopefully, sexual practice (or harassment) is out of bounds there. By comparison, orientation that gives rise to practice arguably does matter in the close quarters of the military, which is why the military's "don't ask/don't tell" policy is closer to a just outcome than either outright denial of the opportunity for military service or indiscriminate inclusion. Recently, the U.S. Court of Appeals for the Armed Forces left open the issue of whether the Supreme Court's decision in *Lawrence* necessitates a change in the "don't ask/don't tell" policy, but found the policy unquestionably valid where a higher ranked officer engaged in homosexual acts with someone under his command.<sup>75</sup>

### A Final Word

The federal government has once before ruled a marital relation out of bounds in its prohibition of polygamy in *Reynolds v. United States*.<sup>76</sup> Today, the Mormon faith – without polygamy – is seen as producing highly responsible, committed families and reliable citizens. "Non-Mormons became more tolerant of Mormon religious beliefs as soon as Mormons . . . conformed to more traditional

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75. In *U.S. v. Marcum*, 60 M.J. 198 (2004) the CAAF left open the issue of whether *Lawrence* applies to the military in the same manner as it applies to the general population. The final decision in *Marcum* favored the Pentagon's prosecution of Air Force Technical Sgt. Eric P. Marcum for sodomy under Article 125 of the Uniform Code of Military Justice. That outcome, however, depended entirely on the CAAF's factual conclusion that the sergeant had engaged in sodomy with one of his subordinates, in circumstances suggesting that the junior serviceman may well have felt coerced into the sexual encounter. *Lawrence*, of course, did not undertake to protect a right to sexual privacy when coercion was involved. Thus, the ruling against Marcum was keyed to the difference in rank between the two sexual partners, in violation of explicit military regulations reinforced by criminal punishment—regulations designed to assure that superiors do not absorb their rank. Article 125, therefore, is constitutional when used in that factual circumstance, the CAAF concluded. Chief Judge Susan J. Crawford wrote separately indicating that the majority should not have made any assumption that *Lawrence* applied at all. Military lawyers had argued that *Lawrence* simply did not apply "in the military environment due to the distinct and separate character of military life from civilian life as recognized by the Supreme Court in *Parker v. Levy* (1974)" and had contended that "*Lawrence* only applies to civilian conduct." There appears to be some weakening of this position, however. The military landscape, Judge Baker wrote in the majority, is less certain than the government suggests. The fog of constitutional law settles on separate and shared powers where neither Congress nor the Supreme Court has spoken authoritatively. Congress has indeed exercised its Article I authority to address homosexual sodomy in the Armed Forces, but this occurred prior to the Supreme Court's constitutional decision and analysis in *Lawrence*.

76. 98 U.S. 145 (1878).

conduct.”<sup>77</sup> Polygamy, itself, however, was declared by the Court to be “subversive of good order,” and that precedent is undisturbed. It is difficult to discern how same-sex marriage would be consistent with the holding in *Reynolds*. Nevertheless, critics of the *Reynolds* opinion argue that the case was wrongly decided “because the Court overrode core personal rights of privacy and religious expression for the sake of diffuse social goals. No victims of Reynolds’ conduct were produced

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What then of same-sex marriage? Would same-sex marriage be subversive of good order? Would there be victims of this public affirmation of homosexual practice? The strongest aspect of the Mormon polygamy claim was its argued religious origin. It was a plea for a religious experience outside the bounds of community. Whether the American conception of religious freedom is robust enough, then or now, to permit religiously-grounded polygamy can be debated. But the proponents of same-sex marriage have little in common with the Mormon elders who searched for Zion in the Utah territory of the 19<sup>th</sup> century. That comparison is as ill-fitting as the claimed analogy to civil rights. Same-sex marriage advocates do not seek a community apart, but the remaking of the larger community in ways that contradict the procreative truth of the human person.

As it is proposed to be remade, the redefining of marriage is subversive of the state objective in sustaining the national population by responsible procreation. While this singular objective may lack the multi-faceted eloquence of spiritual affirmations of traditional marriage,<sup>79</sup> or more expansive moral discourse, it is more than

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77. EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS 374 (1988).

78. *Id.*

79. The Vatican’s statement in opposition to same-sex marriage, for example, largely resonates with those who possess a spiritual faith that understands marriage as the completion of two sides — male and female — of the Divine creation. We can scarcely understand God, but an appreciation of the unity of both genders gives us a clue. The Vatican writes:

The Church’s teaching on marriage and on the complementarity of the sexes reiterates a truth that is evident to right reason and recognized as such by all the major cultures of the world. Marriage is not just any relationship between human beings. It was established by the Creator with its own nature, essential properties and purpose. No ideology can erase from the human spirit the certainty that marriage exists solely between a man and a woman, who by mutual personal gift, proper and exclusive to themselves, tend toward the communion of their persons. In this way, they mutually perfect each other, in order to cooperate with God in the procreation and upbringing of new human lives.



sufficient – indeed compelling – for the people to proscribe same-sex unions.